

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 15, 2009

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: General Die Casters, Inc.
Cases 8-CA-37932, 8-CA-38042, 8-CA-38049, 530-6050-2075
8-CA-38070, 8-CA-38277, 8-CA-38306, and 530-6067-4055-8500
8-CA-38358 530-8049

These cases were resubmitted for advice on whether the Employer violated Section 8(a)(5) of the Act by failing to provide notice and an opportunity to bargain before disciplining and discharging employees. In light of the Board's recent decision in Alan Ritchey,¹ and the additional investigation showing that the Employer's discretion has been circumscribed by the framework of its progressive disciplinary system, we agree with the Region that the Employer's unilaterally imposed discipline was not unlawful.

The background facts of these cases are set forth in detail in our previous memorandum.² In brief, prior to commencement of negotiations for a first contract, this recently certified Union requested that the Employer bargain before taking disciplinary action against employees. Despite that request, the Employer continued disciplining and discharging employees without first notifying the Union and providing an opportunity to bargain.

In our previous memorandum, we concluded that the Employer's discipline policy, as written, gave it unlimited discretion. We found that the statement in the policy that "leniency in any situation will not be a waiver to impose discipline in another" reserved to the Employer substantial discretion to decide when, and for what offenses, it would issue discipline. And, although the policy described the various levels of discipline available -- suggesting a progressive discipline policy -- by stating that the

¹ 354 NLRB No. 79 (September 25, 2009).

² General Die Casters, Inc., Cases 8-CA-37932, et al., Advice memorandum dated August 27, 2009.

discipline may occur "in any order," the Employer reserved full discretion to decide the level of punishment for each offense. In addition, we concluded that, as written, the Employer also had discretion to issue discipline for violations of its 2007 attendance policy.

Despite our conclusion that both policies reserved to the Employer substantial discretion in deciding discipline for employees, we directed the Region to investigate further to determine whether the Employer, in practice, issued discipline to employees in a predictable way. Additional investigation of the Employer's actual practice of issuing discipline would allow us to assess whether the Employer had established a past practice based on limited discretion or whether its practice was so broad or unpredictable as to negate a finding of an established past practice.

The Region's additional investigation disclosed that, prior to the election, the Employer generally observed the progressive disciplinary system. Although there were some deviations in the level of discipline applied, for the most part, verbal warnings preceded written warnings, written warnings preceded suspensions, and second written warnings or suspensions preceded terminations. While there were some instances of accelerated discipline, those typically were limited to probationary employees.

The Employer also followed the progressive disciplinary procedure after the election. For instance, disciplinary records showed that employees generally progressed from verbal warnings through the scale to final written warnings. At times, in lieu of termination, the Employer issued a second, final warning.

The investigation also disclosed that both before and after the election, the Employer generally imposed progressive discipline for violations of the attendance policy. Although the attendance policy does not quantify the number of absences that will result in disciplinary action, initial violations of the policy generally resulted in a warning, with progressive sanctions for the accumulation of additional violations.

In all, the Region's investigation revealed that, notwithstanding occasional deviation from the Employer's progressive discipline and attendance policies, its actions were generally circumscribed within the framework of that progressive disciplinary system.

While the Region was undertaking its additional investigation, on September 25 the Board issued a decision

in Alan Ritchey.³ In that case, relying on Fresno Bee,⁴ the Board held that the Employer had not violated Section 8(a)(5) by unilaterally imposing discipline on employees where the employer's discipline "was meted out in the context of a five-step progressive discipline system, which predated the Union's selection as bargaining representative."⁵ The Board found that the discretion that the employer exercised in applying those policies "operated within the parameters of its progressive discipline procedure."⁶ However, the Board specifically noted that, in rejecting the General Counsel's argument that the employer had effectively unlimited discretion, it did not need to decide how much discretion was required before a duty to bargain attached.⁷

In agreement with the Region, we conclude that the Employer did not violate Section 8(a)(5) of the Act by failing to provide notice and an opportunity to bargain before disciplining and discharging employees. The Region should therefore dismiss the charge, absent withdrawal.

The Employer's unilateral discipline and discharge of employees here is the type of employer conduct found lawful in Alan Ritchey. This Employer has an established policy covering a comprehensive range of misconduct that is subject to discipline. While the written policy expressly reserves to the Employer a great deal of discretion, the Employer has applied the discipline consistently with past practice. With only minor deviation, verbal warnings generally preceded written warnings, written warnings preceded suspensions, and second written warnings or suspensions preceded terminations. These facts establish a practice, as in Alan Ritchey, in which the Employer's discipline "was meted out in the context of a clearly established progressive discipline system, which predated the Union's selection as bargaining representative."⁸ Further, the discretion that the Employer exercised in

³ 354 NLRB No. 79.

⁴ 337 NLRB 1161 (2002).

⁵ 354 NLRB No. 79, slip op. at 4.

⁶ Ibid.

⁷ Id., slip op at 4, n. 12

⁸ Id., slip op. at 4.

applying those policies "operated within the parameters" of that progressive discipline procedure.⁹

Accordingly, the Region should dismiss the complaint, absent withdrawal.

B.J.K.

⁹ Ibid.